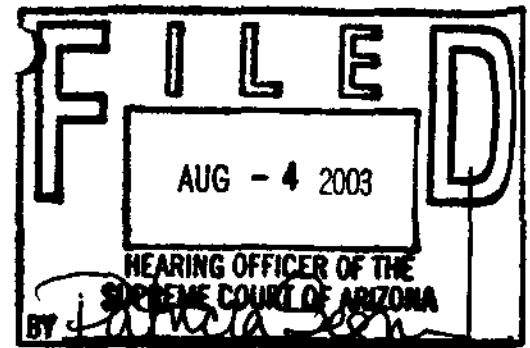


1 Patricia E. Nolan (009227)  
Hearing Officer 7Y  
2 2702 North Third Street, Suite 3000  
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4  
5 **BEFORE A HEARING OFFICER**

6 **IN THE MATTER OF A MEMBER OF**  
7 **THE STATE BAR OF ARIZONA,**

8 **DAVID W. COUNCE,**  
9 **Bar No. 010822,**

10 **Respondent.**

No's. 02-1649, 02-1949,  
03-0058 and 03-0217

11 **HEARING OFFICER'S**  
12 **REPORT AND RECOMMENDATION**

13 **PROCEDURAL HISTORY**

14 This matter concerns a series of probable cause orders issued by the State Bar of Arizona.  
15 Probable Cause Order No. 02-1649 (regarding the Faulkner complaint) was filed on October 28,  
16 2002. A second Probable Cause Order (No. 02-1949, concerning the Tibbs complaint) was filed on  
17 December 24, 2002. A third Probable Cause Order (No. 03-0058, regarding the Donahoe  
18 complaint) was filed on March 28, 2003. Following the issuance of these three Probable Cause  
Orders, a Complaint was filed on April 1, 2003. This Complaint was never served on Respondent.

19 On April 4, 2003, a fourth Probable Cause Order (No. 03-0217, concerning the Warfield  
20 complaint) was filed. An Amended Complaint was filed on that same date, adding a fourth count  
21 (with regard to the fourth Probable Cause Order). The Amended Complaint was personally served  
22 on Respondent on April 7, 2003.

23 Respondent did not file an answer to the Amended Complaint and, therefore, the  
24 Disciplinary Clerk filed a Notice of Default on May 2, 2003 and an Entry of Default on May 23,  
25 2003.

26 Neither party requested to be heard in aggravation or mitigation and this Hearing Officer  
27 filed an Order on July 18, 2003 ordering that the parties submit simultaneous memoranda on or  
28 before July 2, 2003, at which time the matter would be deemed submitted. The State Bar filed its

1 Proposed Findings of Fact, Conclusions of Law and Recommended Sanction on July 2, 2003.

2 Respondent filed nothing.

3 **FINDINGS OF FACT**

4 Given the entry of Respondent's default, the facts set forth in the Complaint have been  
5 deemed admitted by Respondent.

6 1. At all times relevant hereto, Respondent was a member of the State Bar of Arizona,  
7 having been admitted on October 25, 1986.

8 COUNT ONE (01-1649)

9 2. Respondent represented Elizabeth Faulkner in a complaint for contribution filed  
10 against her in the East Tempe Justice Court on November 1, 2000.

11 3. Respondent failed to communicate with Ms. Faulkner regarding the status of her  
12 case from approximately January 2002 through March 2002.

13 4. Ms. Faulkner was then able to contact Respondent and was told by Respondent that  
14 there was no activity with her case at that time.

15 5. In July or August 2002, Respondent again failed to respond to Ms. Faulkner's  
16 request for information concerning her case.

17 6. In early August 2002, Ms. Faulkner contacted the Tempe Justice Court and learned  
18 that a default judgment had been entered against her in the amount of \$16,000.00.

19 7. On September 27, 2002, Ms. Faulkner retrieved her file from Respondent. From  
20 that file, Ms. Faulkner learned that her answer had been stricken on June 21, 2001 for failure to  
21 produce discovery material and that her default had been entered. She also learned that the case  
22 had been reinstated, but that her answer had again been stricken and a default entered on February  
23 27, 2002, again for failure to produce discovery material.

24 8. From the retrieved file, Ms. Faulkner also discovered that a settlement proposal had  
25 been sent to Respondent on November 21, 2001. Respondent had never informed Ms. Faulkner  
26 about this settlement offer.

27 9. On August 27, 2002, the State Bar sent a letter to Respondent asking him to respond  
28 to Ms. Faulkner's allegations. Respondent failed to respond to that correspondence.

1           10.     A second letter was sent to Respondent on September 30, 2002, again asking  
2 Respondent to respond to Ms. Faulkner's allegations. Respondent failed to respond to that letter as  
3 well.

4                                   COUNT TWO (02-1949)

5           11.     Respondent was retained to represent Norman Tibbs in a personal injury matter.

6           12.     Respondent filed the complaint one day before the statute of limitations ran, and  
7 then failed to timely effectuate service. As a result, the complaint was dismissed and Mr. Tibbs'  
8 cause of action was precluded.

9           13.     Respondent failed to respond to Mr. Tibbs' new attorney's requests to turn over  
10 Mr. Tibbs' file.

11           14.     On October 10, 2002, the State Bar sent a letter to Respondent asking him to  
12 respond to Mr. Tibbs' allegations. Respondent failed to respond to the State Bar's letter.

13           15.     A second letter was sent to Respondent on November 27, 2002, again asking  
14 Respondent to respond to Mr. Tibbs' allegations. Respondent failed to respond to that letter as  
15 well.

16                                   COUNT THREE (03-0058)

17           16.     In Maricopa County Case No. CV 2000-003474, Respondent was ordered by Judge  
18 Gary E. Donahoe to turn over the file of his client, Anthony M. Lanzzone, to Mr. Lanzzone's new  
19 attorney, Susan E. Irwin. Respondent failed to do so.

20           17.     An Order To Show Cause ("OSC") was issued ordering Respondent to appear and  
21 show cause why he should not be held in contempt of court for failure to deliver the file as ordered.

22           18.     Respondent was served with the OSC on November 20, 2002.

23           19.     Respondent failed to appear at the OSC hearing.

24           20.     Judge Donahoe found Respondent in indirect civil contempt for his failure to abide  
25 by the court's order to turn over Mr. Lanzzone's file to Ms. Irwin.

26           21.     Respondent was sentenced to 60 days in the Maricopa County Jail. Respondent  
27 could have purged the judgment of contempt by turning over Mr. Lanzzone's file to Ms. Irwin.

28           22.     The court ordered that an arrest warrant be issued for Respondent's immediate arrest

1 and incarceration.

2 23. On January 15, 2003, a copy of the minute entry was sent to Respondent, who was  
3 asked to respond within twenty days. Respondent failed to file a response.

4 24. A second letter was sent to Respondent on February 12, 2003, asking Respondent to  
5 respond to the allegations. Respondent failed to respond to the second letter.

6 COUNT FOUR (03-0217)

7 25. Elizabeth Faulkner was co-counsel with respondent in Arizona District Court Case  
8 No. CIV 00-1851 PHX SMM, representing plaintiff James W. Warfield.

9 26. At all relevant times, Respondent had exclusive possession of Mr. Warfield's file.

10 27. The defendant in the lawsuit filed a motion for summary judgment but Respondent  
11 failed to file a response to it.

12 28. Respondent told Mr. Warfield, Ms. Faulkner and Judge Stephen M. McNamee that  
13 he had filed the response, when in fact he had not.

14 29. Ms. Faulkner learned that Respondent had not filed the response, even though it was  
15 completed, and Respondent refused to turn the file over to her so she could file the response.

16 30. Respondent knew that Ms. Faulkner did not have the file materials needed to  
17 prepare a response to the motion for summary judgment herself, and also knew the deadline to file  
18 the response had "long passed."

19 31. Respondent failed to accept or return Ms. Faulkner's telephone calls.

20 32. As of January 29, 2003, Respondent still refused to allow Ms. Faulkner to retrieve  
21 Mr. Warfield's file.

22 33. Respondent failed to respond to the Bar's charging letter in this matter, which was  
23 sent to him on February 13, 2003, and failed to respond to a second letter sent to him on March 14,  
24 2003.

25 COUNT FIVE (Prior Misconduct)

26 34. Respondent was suspended for six months and one day on June 2, 2003 in File No.  
27 01-2359, for violation of ERs 1.1, 1.2, 1.3, 1.4, 1.16(d), 3.2, 8.1 and Supreme Court Rule 51(h) and  
28 (i). Respondent was to be placed on probation for two years upon reinstatement.

1 **CONCLUSIONS OF LAW**

2 This Hearing Officer finds that there is clear and convincing evidence that Respondent  
3 violated Rule 42, Ariz.R.S.Ct., in the following ways:

4 **COUNT ONE (01-1649)**

5 1. ER 1.1: Respondent failed to provide Ms. Faulkner with competent  
6 representation.

7 2. ER 1.2: Respondent failed to abide by Ms. Faulkner's decisions concerning the  
8 representation and failed to consult with Ms. Faulkner before allowing her case to be dismissed.  
9 Respondent failed to inform Ms. Faulkner about a settlement offer.

10 3. ER 1.3: Respondent failed to act with reasonable diligence and promptness in  
11 representing Ms. Faulkner in this matter.

12 4. ER 1.4: Respondent failed to keep Ms. Faulkner reasonably informed about the  
13 representation. Respondent failed to explain matters to the extent reasonably necessary so  
14 Ms. Faulkner could make informed decisions concerning the representation.

15 5. ER 3.2: Respondent failed to expedite litigation consistent with the interest of  
16 Ms. Faulkner.

17 6. ER 3.4: Respondent failed to fulfill his obligations under the rules of a tribunal.

18 7. ER 8.1(b) and Supreme Court Rule 51(h) and (i): Respondent failed to respond to  
19 a lawful demand for information from the State Bar, failed to furnish information to or respond  
20 promptly to a request from bar counsel, and failed to cooperate with State Bar staff.

21 8. ER 8.4(c): Respondent engaged in conduct involving dishonesty, fraud, deceit or  
22 misrepresentation.

23 9. ER 8.4(d): Respondent's conduct in this matter was detrimental to the  
24 administration of justice.

25 **COUNT TWO (02-1949)**

26 10. ER 1.1: Respondent failed to provide Mr. Tibbs with competent representation.

27 11. ER 1.2: Respondent failed to abide by Mr. Tibbs' decisions concerning the  
28 representation and failed to consult with Mr. Tibbs' before allowing his case to be dismissed.

12. ER 1.3: Respondent failed to act with reasonable diligence and promptness in representing Mr. Tibbs in this matter.

13. ER 1.4: Respondent failed to keep Mr. Tibbs reasonably informed about the representation. Respondent failed to explain matters to the extent reasonably necessary so Mr. Tibbs could make informed decisions concerning the representation.

14. ER 1.16(d): Respondent failed to turn over Mr. Tibbs' file to Mr. Tibbs' new attorney when requested.

15. ER 3.2: Respondent failed to expedite litigation consistent with Mr. Tibbs' interests.

16. ER 8.1(b) and Supreme Court Rule 51(h) and (i): Respondent failed to respond to a lawful demand for information from the State Bar, failed to furnish information to or respond promptly to a request from bar counsel, and failed to cooperate with State Bar staff.

17. ER 8.4(d): Respondent's conduct in this matter was detrimental to the administration of justice.

**COUNT THREE (03-0058)**

18. ER 1.16(d): Respondent failed to turn over Mr. Lanzzone's file to Ms. Irwin when ordered to do so by the court.

19. ER 8.1(b) and Supreme Court Rule 51(h) and (i): Respondent failed to respond to a lawful demand for information from the State Bar, failed to furnish information to or respond promptly to a request from bar counsel, and failed to cooperate with State Bar staff.

20. ER 8.4(d): Respondent's conduct in this matter was detrimental to the administration of justice.

21. Supreme Court Rule 51(e) and (k): Respondent willfully disobeyed an order of the court requiring him to turn over Mr. Lanzone's file to Ms. Irwin.

**COUNT FOUR (03-0217)**

22. ER 1.1: Respondent failed to provide Mr. Warfield with competent representation.

23. ER 1.3: Respondent failed to act with reasonable diligence and promptness in

1 representing Mr. Warfield in this matter.

2 24. ER 1.4: Respondent failed to keep Mr. Warfield reasonably informed about the  
3 representation. Respondent failed to explain matters to the extent reasonably necessary so  
4 Mr. Warfield could make informed decisions concerning the representation.

5 25. ER 3.2: Respondent failed to expedite litigation consistent with the interest of  
6 Mr. Warfield.

7 26. ER 3.3: Respondent knowingly made a false statement of material fact to a  
8 tribunal.

9 27. ER 4.1: Respondent knowingly made a false statement of material fact to a third  
10 erson.

11 28. ER 8.1(b) and Supreme Court Rule 51(h) and (i): Respondent failed to respond to  
12 a lawful demand for information from the State Bar, failed to furnish information to or respond  
13 promptly to a request from bar counsel, and failed to cooperate with State Bar staff.

14 29. ER 8.4(c): Respondent engaged in conduct involving dishonesty, fraud, deceit or  
15 misrepresentation.

16 30. ER 8.4(d): Respondent's conduct in this matter was detrimental to the  
17 administration of justice.

18 In addition to the foregoing violations, the State Bar suggests that Respondent's conduct in  
19 Counts Two and Three violated ER 8.4(c) which declares that it is professional misconduct for a  
20 lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. While there  
21 is nothing laudable about Respondent's activities as alleged (and admitted) in Counts Two or  
22 Three, there is no allegation in either of those two counts which even suggest that Respondent  
23 engaged in any conduct involving dishonesty, fraud, deceit or misrepresentation. As such, the  
24 undersigned finds no violation of that particular Ethical Rule.

#### 25 ABA STANDARDS

26 ABA *Standard 3.0* provides that four criteria should be considered when imposing  
27 discipline: (1) the duty violated; (2) the lawyer's mental state, (3) the actual or potential injury  
28 caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

1 This Hearing Officer considered *Standards 4.41, 6.21 and 7.1* in determining the  
2 appropriate sanction warranted by Respondent's conduct in this case. These standards provide that:

3 4.41 Disbarment is generally appropriate when:

- 4 (a) a lawyer abandons the practice and causes serious or potentially serious  
5 injury to a client; or  
6 (b) a lawyer knowingly fails to perform services for a client and causes  
7 serious or potentially serious injury to a client; or  
8 (c) a lawyer engages in a pattern of neglect with respect to client matters and  
9 causes serious or potentially serious injury to a client.

10 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court  
11 order or rule with the intent to obtain a benefit for the lawyer or another, and  
12 causes serious injury or potentially serious injury to a party, or causes serious  
or potentially serious interference with a legal proceeding.

13 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in  
14 conduct that is a violation of a duty owed to the profession with the intent to  
15 obtain a benefit for the lawyer or another, and causes serious or potentially  
16 serious injury to a client, or the legal system.

17 Disbarment is generally appropriate when a lawyer abandons his practice, leaving clients  
18 completely unaware that they have no legal representation and often leaving clients without any  
19 legal remedy. Such abandonment can cause serious or potentially serious injury to clients.  
20 Disbarment is also generally appropriate with knowing violations of court orders and where a  
21 lawyer knowingly engages in conduct that violates a duty owed to the profession which causes  
22 serious injury or potentially serious to a client, the public or the legal system.

23 Here, Respondent abandoned a number of clients, knowingly failed to obey a lawful court  
24 order, lied to the court, co-counsel and his clients, failed to return client files and failed to  
25 participate in the disciplinary process. His actions caused actual harm to his clients, to the public  
26 and to the legal system.

27 After misconduct has been established, aggravating and mitigating circumstances pursuant  
28 to *Standards 9.22 and 9.32* are to be considered in determining sanctions. Although no  
aggravation/ mitigation hearing was requested by either party, the undersigned Hearing Officer  
finds the following factors should be considered.

In aggravation:

*Standard 9.22(a) – prior disciplinary offenses.* Respondent is currently suspended for



misconduct found in File No. 01-2559.

*Standard 9.22(c) – pattern of misconduct.* Respondent has clearly abandoned a number of clients.

*Standard 9.22(d) – multiple offenses.* Again, Respondent has clearly abandoned a number of clients.

*Standard 9.22(e) – bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency.* Respondent utterly failed to respond to repeated requests for information and to participate in the formal disciplinary process.

*Standard 9.22(g) – refusal to acknowledge wrongful nature of conduct.*

*Standard 9.22(i) – substantial experience in the practice of law.* Respondent has been a member of the State Bar for sixteen years.

### PROPORTIONALITY REVIEW

The Supreme Court has held that, to achieve proportionality when imposing discipline and to achieve the purposes of discipline, in each situation such discipline must be tailored to the individual facts of the case. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993). However, because sanctions against lawyers must have internal consistency to maintain an effective and enforceable system, cases that are factually similar are particularly instructive. *In re Pappas*, 159 Ariz. 516, 526, 768 P.2d 1161, 1171 (1988).

The Hearing Officer found several cases critical to the determination of an appropriate sanction in this case.

In *Matter of Woltman*, 181 Ariz. 525, 892 P.2d 861 (1995), attorney Woltman was found to have converted client funds, failed to perform work for which he was retained, failed to provide clients with competent and diligent representation, failed to maintain communications with clients and to respond to their requests for information, and failed to return client files and property. In addition, Woltman was found to have made misrepresentations to clients concerning the status of their cases and, among other things, failed to cooperate with the State Bar's investigations into many of these matters. There were several aggravating circumstances and no mitigating factors. Woltman was disbarred.

In *Matter of Young*, 164 Ariz. 502, 794 P.2d 135 (1990), Young was found to have failed to provide competent legal representation, failed to appear in court, failed to comply with various

1 court orders and rules, filed unsupported pleadings, misappropriated client funds, made false  
2 statements to a tribunal, failed to pay a judgment obtained against him by his clients and failed to  
3 cooperate with the State Bar's investigations into many of the complaints. Young was disbarred.

4 Finally, in *Matter of Kobashi*, 181 Ariz. 253, 889 P.2d 611 (1995), Kobashi was found to  
5 have, among other things, failed to maintain adequate communications with his clients and failed to  
6 respond to a request for information from his clients. In addition, he failed to respond to  
7 correspondence from the State Bar during the investigation. There were numerous aggravating  
8 factors and, as here, no mitigating factors. Kobashi was disbarred.

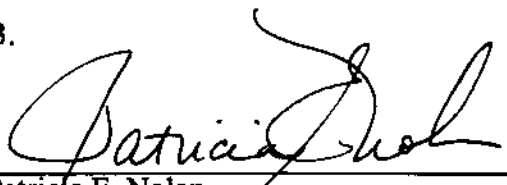
### 9 RECOMMENDATION

10 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and  
11 deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is  
12 also the objective of lawyer discipline to protect the public, the profession and the administration of  
13 justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public  
14 confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

15 Upon consideration of the facts, application of the *Standards*, including aggravating and  
16 mitigation factors, and a proportionality analysis, this Hearing Officer recommends that:

- 17 1. Respondent be disbarred from the practice of law;
- 18 2. Respondent be ordered to pay the costs and expenses incurred in these disciplinary  
19 proceedings; and
- 20 3. If Respondent successfully applies for readmission, he be required to comply with  
21 the terms of his current suspension.

22 DATED this 4<sup>th</sup> day of August, 2003.

23  
24   
25 Patricia E. Nolan  
26 Hearing Officer 7Y

27 ORIGINAL filed with the Disciplinary  
28 Clerk this 4<sup>th</sup> day of August, 2003,  
and a COPY mailed this same date to:

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10 P. Malowardoff  
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